IN THE MATTER OF THE ARBITRATION BETWEEN

United Food & Commercial Workers
Local 527,
Union

-and- FMCS Case No.: 120712-57053-3

Red Wing Shoe Company, Inc.,
Employer

ARBITRATOR:	Christine D. Ver Ploeg
DATE AND PLACE OF HEARING:	January 8, 2013 Red Wing Shoe Company Red Wing, Minnesota
DATE OF AWARD:	March 26, 2013
CLOSE OF RECORD:	February 22, 2013

ADVOCATES

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ISSUE:

Did the Company breach the parties' Agreement by using temporary and part-time employees during June and July of 2012? If so, what shall be the remedy?

BACKGROUND

This case has been brought by United Food & Commercial Workers, Local 527 (hereinafter "Union") on behalf of members of this bargaining unit, all of whom are full time production and maintenance employees at the Red Wing Shoe Company in Red Wing, Minnesota. The Union is their exclusive representative.

The dispute which gives rise to this arbitration stems from the Company's hiring and utilization of temporary[1] and part-time employees[2] during June and July 2012. The Union submits that the Company's doing so violated the parties' collective bargaining agreement in that the Agreement permits such hiring only "to meet production demands," and the evidence demonstrates there was no such need. The Company disputes the Union's interpretation of the contract language and further argues that its actions were reasonable.

The essential facts in this case are not in dispute. The Company, a shoe manufacturer, has been in business since 1905. Its operations are currently consolidated into one plant, Plant 2, located in Red Wing, Minnesota. The Union represents approximately 480 bargaining unit employees at that plant, and schedules provide for both a day and a night shift.

The Company determines its production needs based upon market forecasts. In April 16, 2012, it approved a forecast that 1,276,000 pairs of shoes made at the plant would be sold during that same fiscal year (basically from Thanksgiving to Thanksgiving). Many factors go into the forecast including the unemployment rate, economic indicators, gas and oil prices, style trends and sales representative feedback. Unfortunately the April 16 forecast later had to be reduced by over 100,000 pairs of shoes due to four primary factors:

1. An order with the Venezuelan government for 100,000 pairs of shoes was reduced by

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[1] A company witness has testified that *temporary* employees – who are mostly college students – have been used almost exclusively during the summer months. They typically work at Plant 2 May through the end of summer. This witness further testified that a majority of the temporary employees – up to 75% of them – have some connection to the Company – *i.e.*, they are the relatives of permanent staff. Section 16 mandates that bargaining unit employees' relatives be given preference for positions as summer temporary employees.

[2] This witness testified that the use of *part-time employees* under Section 17 of the Agreement has been limited exclusively (or almost so) to retired members of the bargaining unit. These retirees have a special skill set that might occasionally be needed, or they can train employees, or they can help in the case of bottlenecks, or an employee's leave of absence, or some other circumstances when needed because of their higher skills. The Company had five

15,000 pairs;

2. The Company introduced a new brand of work boots in March 2012, which failed to expand the market; instead the new brand cannibalized the Company's other work boots;

3. Oil prices leveled off, which reduced the forecast for Middle East purchases by 55,000 pairs; and

4. A poor international economy resulted in reducing the forecast for a higher-priced, fashion brand by 19,000 pairs.

Based upon these unexpected factors, on June 22, 2012, the Company reduced its official forecast to 1,170,000 pairs of shoes for the fiscal year, a reduction that represented approximately one month's production with five months to go until the following Thanksgiving. By that date the Company had already offered temporary summer employment to several persons and all 16 of those temporary employees had started work. The last temporary employee began work on June 4, 2012. The Company also had five part-time employees on the payroll at the start of summer. All of the part-time employees were also hired prior to 6/4/12, and at least two of them had hire dates before the start of 2012.

The Union argues that the parties' Agreement permits the Company to hire temporary and part-time employees only to the extent necessary "to meet production demands." (Article III, Sections 16 and 17.) It submits that the Company was well aware of its reduced production needs when the temporary employees began work, and therefore their and the part-timers' employment violated the Agreement's provisions. The Union offered the following memos as evidence of the Company's knowledge of its reduced need well before the first temporary employees began work, and before the revised forecast of June 22, 2012:

1. 6/6/12 production memo to Union employees: As we start the summer months however, we find ourselves with too much inventory of product made in the United States as well as those styles we purchase from China. We have begun cutting back on orders to our partners in China. In addition, I have asked Chris Zylka and the Plant Managers to finds ways to reduce our domestically made

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product while minimizing any impact on our customers and our plant employees. The outcome of this effort is the recommendation that we shut down most of our production lines over the 4th of July week.

2. 6/6/12 Domestic Manufacturing Update: Our inventories have grown in the past several months and as a result we are undertaking a few corrections to get our inventory levels back down. As you may already know, we have already taken some steps to mitigate this build up (Danville Plant shut down Memorial Day week, Plant 2 has already been shutting down lines periodically, etc…). In addition we are going to modify our production schedules for the upcoming Independence Day week.

Following the June 22, 2012, revised forecast, the Company took immediate steps to move all of the temporary employees who had been assigned to production jobs out of them. Alternate positions included placement in Company headquarters, product development, or with public service organizations within the community. By July 19, 2012, all temporary employees and part-time employees had been removed from production positions at the plant. In the meantime, no full-time unit employee was ever scheduled for reduced hours or was required to take off work unpaid.

Despite this, the Union asserts that while temporary employees were working in production bargaining unit members were adversely affected in that some were reassigned to disagreeable nonproduction work in order to fill their time. This resulted in full-time employees choosing to take unpaid time off – BC days – in lieu of performing that work.

The parties strenuously disagree whether the contract requires proof of "production demands" before the Company may hire part-time or temporary employees, and they further disagree whether the Company's actions at this time were reasonable or not. Based on its claim that the Company has breached the Agreement, the Union has proposed three different options for a monetary award to be distributed amongst the membership:

1. For every hour that a part-time or temporary employee worked in violation of the contract, the Employer shall pay the approximate average bargaining unit wage rate of $16.00;

2. The Employer shall pay an amount equal to the total wages paid to part-time and temporary employees during the period when the contract prohibited their employment; or;
3. Since the Employer's use of part-time and temporary employees allowed it to illegitimately complete its production work using non-Union employees at a reduced rate, the Employer shall pay the difference between the part-time/temporary wage rate of $10.00 and the average Union rate of 16.00 per hour for every hour worked by temporary and part-time employees.

On behalf of the members of the bargaining unit the Union filed a timely grievance protesting the Employer's action. The parties were unable to resolve their differences concerning this matter in earlier steps of the grievance process, and have agreed that this dispute is now properly before the arbitrator for resolution. The parties and this arbitrator met for a hearing on this matter on January 8, 2013, and the parties submitted post-hearing briefs which were received on February 22, 2013.

RELEVANT CONTRACT LANGUAGE

The Parties' current Collective Bargaining Agreement provides in relevant part:

> **[Article III] Section 10. Flexibility**
> Employees will be responsible for performing additional operations within their shift to keep work flowing. An employee may be transferred by the Employer to another position within their shift during regular and overtime hours. * * *
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> **[Article III] Section 16. Temporary Employees**
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> To the extent that Red Wing Shoe Company utilizes temporary employees throughout the year to meet production demands, temporary employees:
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> - Shall not exceed three (3) per production line or department per shift unless more are needed to avoid moving full-time employees from their positions. The total number of Temporary and Part-time employees working shall not exceed 5% of the total bargaining unit employees. By mutual agreement between the Employer and Union, said percentage may be increased.
> - Are persons hired by the Employer to work for a period not to exceed one hundred and twenty (120) calendar days in each calendar year. During this 120 day period, said employees will not be required to join the Union.

However, if employee is hired on full-time, the Union shall collect Union dues retroactively to the sixtieth (60th) day.

- May be placed on any shift and any opening according to the needs of the Employer, provided there are no full-time employees with recall rights on layoff.

* * *

- Shall not be eligible for overtime scheduled Monday through Thursday if a senior qualified operator on that shift has come forward during the sign-up process. During overtime scheduled on Fridays, temporary employees will not be allowed to work overtime, if a qualified replacement from either shift has come forward in the overtime replacement process. In the event of an unforeseen circumstance, temporary employees may be required to work.
- May be discharged or terminated without limitation.

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If temporary employees are hired for work between Memorial Day and Labor Day, bargaining unit employees shall have an opportunity to have relatives apply for work and be given preferential consideration.

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[Article III] Section 17. Part Time Employees

To the extent that Red Wing Shoe Company utilizes part-time employees throughout the year to meet production demands, part time employees:

- Shall not exceed three (3) per production line or department per shift unless more are needed to avoid moving full-time employees from their positions. The total number of Temporary and Part-time employees working shall not exceed 5% of the total bargaining unit employees. By mutual agreement between the Employer and Union, said percentage may be increased.
- Shall not be eligible for overtime.
- Shall not be employed while regular employees are on layoff.
- Are persons hired by the Employer who will work no more than forty (40) hours per pay period. Interested employees and retirees may apply and will be given preferential consideration.
- May be placed on any shift and any opening according to the needs of the Employer.

DISCUSSION AND DECISION

In this case the Union has had the burden of proving that the Company violated the parties' Agreement when it utilized part-time and temporary employees in production work in June and July 2012,. For the following reasons, I find that the Union has not met that burden.

1. Contract interpretation: "to meet production demands."

The parties agree that this case turns upon the meaning given to the phrase, "to meet production demands." That term is found in the introduction to the contract's provisions regarding the Company's ability to use temporary and part-time employees. Both Article III, Section 16, Temporary Employees, and Article III, Section 17, Part-Time Employees, begin by stating:

> To the extent that Red Weighing Shoe Company utilizes (temporary/part time) employees throughout the year *to meet production demands,* (temporary/part-time) employees… (emphasis added).

Both provisions then proceed to delineate restrictions regarding the hiring of either category of employee. T**emporary** employees are subject to five restrictions: the number of such employees who can be hired, the length of time for which they can be hired, their placement on shifts, their eligibility for overtime and the Company's ability to discharge or terminate them without limitation. The hiring of **part-time** employees is subject to six restrictions: the number who can be hired, their lack of eligibility for overtime, no one can be employed part-time while a regular employee is on layoff, limitations on hours worked per pay period, preferential consideration given to interested employees and retirees and placement on shifts. The Union does not claim that the Company deviated from the above listed restrictions.

Because the case at hand involves primarily temporary employees, this decision will focus on their employment during June and July 2012. However, the relevant contract language – "to meet production demands" – is found in both Sections 16 and 17 and thus this analysis is applicable to part-time employees as well. Regarding both categories of employees the essential question is the meaning to be accorded the phrase "to meet production demands."

The Union argues that this phrase represents a threshold requirement which the Company must meet before it can begin to utilize temporary or part-time workers. Only after the Company can demonstrate "production demands" can it hire non-fulltime bargaining unit employees, and then their employment is subject to the more specific restrictions set forth in the bullet items that follow that threshold requirement.

The Company submits that the phrase "to meet production demands" is simply a prefatory phrase; it is not an additional requirement. It simply expressly recognizes the Company's right to

assign temporary employees to perform production work – work that might otherwise be deemed "bargaining unit work" – provided that the specific bulleted conditions are fulfilled. In this case, there is no dispute that all of the specific bulleted conditions *have* been filled.

Discussion and decision: I have considered the parties' evidence and argument regarding the proper interpretation of "to meet production needs," and find that it is not a threshold requirement that operates as an independent restriction on the Company's ability to assign temporary or part-time employees to production or maintenance work. Instead the phrase expressly recognizes the Company's right to assign temporary and part-time employees to such work subject to the listed conditions that follow the introductory language.

In finding that the phrase "to meet production needs" is an affirmative authorization of the Company's right to use non-bargaining unit employees to perform what might otherwise be claimed to be bargaining unit work – not a separate and independent restriction on that right – the following evidence and arguments have been relevant.

First, this introductory phrase does not utilize the type of restrictive language that could be expected if the parties had in fact agreed to restrict what might otherwise be viewed as a management right. For example, the language does not state that the Company "may use temporary employees only when…" Second, the introductory phrase begins: "to the extent that (the) Company utilizes (temporary/part-time employees)…" This terminology suggests an element of Company discretion. Third, it is well accepted that determining production needs is typically an inherent managerial right. This fact, coupled with the Company's right to "utilize (employees) to meet production demands," suggests that the introductory phrase is not a restriction. Fourth, the introductory phrase concludes with a colon, not a period. Structurally it can reasonably be read to introduce – not add to – the bullet point restrictions more specifically itemized thereafter.

Finally, if the parties had actually intended that the Company could use temporary/part-time employees only when the full-time workforce was unable to meet production volumes without additional help, it would have been easy to add such clarification. Clarification would have been reasonable given the reality that production needs are "very dynamic," they often change day-to-day. Restricting the use of non-bargaining unit personnel as the Union urges could arguably

require assigning temporary employees on a scattershot basis, a clearly untenable management practice. The Company also reasonably argues that the Union's interpretation is more restrictive than no language at all. In that case, why would be Company ever agree to this?

2. Application of contract language

Despite the above interpretation of the phrase "to meet production needs," the Company does not have *carte blanche* to hire temporary and part-time employees limited only by these specifically enumerated conditions. Hiring outside of the bargaining unit is always subject to a rule of reasonableness, and were the Union able to demonstrate that the Company's actions lacked any reasonable basis – that those actions were arbitrary, capricious and/or discriminatory – this grievance would be granted. However, the evidence does not support such a claim.

Rather, the evidence demonstrates that prior to the final production forecast of June 22, 2012, that forecast was a moving target. By June 22, when the forecast was fixed, all offers had been extended and all temporary employees had already begun work. The last employee started work on June 4, 2012. Although it is true that Company officials were aware before June 22 that the Company had too much inventory and changes must be made, it is also true that with as the facts became better known the Company expeditiously worked to move all temporary employees not already assigned elsewhere out of production jobs. By July 19 no temporary or part-time employee was still working in production or maintenance. In this respect it is relevant to note that not all 16 temporary employees were assigned to production or maintenance work in the first place, and the amount of such work that temporary production workers did perform must be placed in the context of 480 full-time bargaining unit employees.

Moreover, as the Company undertook these efforts at no time did any full-time bargaining unit employee lose any hours or pay. Although the Union complains that some full-time employees were adversely affected by being assigned to perform some cleaning rather than production work, there was little detail regarding the quality or quantity of that cleanup. Moreover, it can be fairly assumed that cleanup is often part of any production employee's work. Indeed, Article 3, Section 1 specifically authorizes the Employer to transfer employees to other positions within their shift during regular and overtime hours "to keep work flowing." There is no requirement that a full-time employee be permitted to bump a temporary or part-time employee.

The Union also argued that some full-time employees took unpaid BC (business conditions) days off in order to avoid objectionable work. However, there was no specific evidence to support this assertion. Rather, the evidence demonstrates that BC, which is voluntary, is often offered to all employees and can arise from a number of factors. The Company does not "place" bargaining unit employees on unpaid BC leave; employees often like days off and accept BC voluntarily.

In summary, these facts provide no evidence that the Company acted unreasonably. The Company hired temporary employees in April and early May, at a time when it assumed a higher forecast and higher summer needs. Indeed, at that same time it was hiring full-time bargaining unit employees. The Company acted in good faith with the best information it had at that time. When the forecast unfortunately had to be lowered, after all of the temporary employees had been hired and begun work, the Company re-assigned employees then in production areas to other areas as quickly as it could.

The Company was not required summarily discharge all temporary and part-time employees at the first indication of excess inventory. Although Section 16 expressly states that a temporary employee "may be discharged or terminated without limitation," this does not *require* the Company to do so. Forecasting production needs is the product of throwing many moving targets into a mix, and the Company had the right to await final determination of a new approved forecast before it undertook decisive action regarding its staffing.

AWARD

For the above reasons this grievance is hereby denied.

March 26, 2013

Christine Ver Ploeg, Arbitrator